United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-4151

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

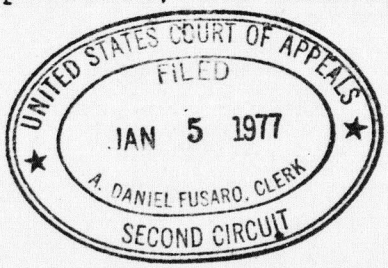
B/P

Greene County Planning Board et al., Town of Durham, et al.,	)	
Petitioners,	)	
v.	)	No. 76-4151 76-4153
Federal Power Commission,	)	
Respondent,	)	
Power Authority of the State of New York, United Brotherhood of Electrical Workers Local 1249,	)	
Intervenors.	)	

PETITION OF FEDERAL POWER COMMISSION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40(a) of the Federal Rules of Appellate Procedure, Respondent Federal Power Commission hereby petitions for rehearing of so much of this Court's opinion of December 8, 1976, as dealt with the question whether the Commission should reimburse petitioners for fees and expenses, and respectfully suggests that rehearing en banc would be appropriate in these circumstances.

In support of this petition, the Commission shows the following:



Procedural History

This case involves the Commission's approval of the location of a transmission line leading from the Power Authority of the State of New York's (PASNY's) Blenheim-Gilboa Pumped Storage Project, FPC No. 2685, located in the towns of Blenheim and Gilboa, New York, to a sub-station near Leeds, New York.

Hearings involving alternative routes for the Gilboa-Leeds line commenced in 1971. Parties to the proceeding included the instant petitioners, Greene County Planning Board and the Town of Greenville (Greene County), and the Town of Durham and Association for the Preservation of Durham Valley (Durham). Intervention was granted to these parties on the basis of their complaints that the Gilboa-Leeds line would pass through Durham Valley and other parts of Greene County.

Hearings on the routing of the transmission line were interrupted by an appeal to this Court, Greene County Planning Board v. FPC (Greene County I), 455 F.2d 412 (2d Cir), cert. denied, 409 U.S. 849 (1972). Among the issues decided in Greene County I was whether PASNY, or in the alternative the Commission, should be required to pay the expenses and fees incurred by intervenors in this proceeding. The Court found no authority in the Federal Power Act to award such relief, stating (455 F.2d at 426):

> [W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clear congressional mandate we should not order the Commission or PASNY to pay the expenses or fees of petitioners, either as they are incurred or at the close of the proceedings. * * * We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances to provide for them when to do so was in the public interest.

Further hearings in this proceeding were held in 1973, at which petitioners renewed their requests that PASNY or the Commission pay their fees and expenses. The Commission denied the requests in Opinion No. 751, issued on January 29, 1976. The Commission gave two independent grounds for its decision: first, relying on Greene County I and the United States Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Commission found that it had no authority to award fees and expenses. Second, in the words of the Commission:

> The intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas * * *. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its rate payers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

The Durham petitioners sought review in this Court of the Commission's decision on the fees issue. Durham relied on a decision issued by the Comptroller General of the United States dated February 19, 1976, which, in response to a request of the Nuclear Regulatory Commission (NRC), advised that in the opinion of the Comptroller General the NRC could use appropriated funds to pay the expenses of indigent intervenors. Durham also relied upon a subsequent letter from the Comptroller General to the Chairman of the House Oversight and Investigations subcommittee written in response to the Chairman's inquiry as to whether the rationale of the NRC decision was also applicable to other agencies, among them the Federal Power Commission. The Comptroller General stated:

> Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. * * *
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> We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency.

On December 8, 1976, this Court issued its decision. The majority found that "the Comptroller General is Congress' agent for the purpose of determining the legality of administrative expenditures" (slip op. 827). Reasoning that public hearings are integral to the Commission's function, the majority found Section 2 of the Act, 16 U.S.C. §793, to be authority for Commission reimbursement of indigent intervenors in light of the Comptroller General's decision, which, the decision stated, "is not clearly incorrect" (slip op. 827-28).

As to the Commission's second ground for denying petitioners' requests for reimbursement, the majority said (slip op. 827):

> Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of unspoiled scenic countryside. They seem to have played an essential role in the proceedings * * *. Thus, the Commission was substantially aided in making its determination by the action of the intervenors.

Judge Van Graafeiland dissented from the majority's decision on the fees and expenses issue. Noting this Court's review of the Commission's statutory authority in Greene County I, Judge Van Graafeiland emphasized the impropriety of the majority's reliance on the contrary interpretation of the Comptroller General as authority

that the Commission be required to reimburse the Durham petitioners (slip op. 830). The judge argued that (slip op. 831):

> The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants, and, a fortiori, has made no request of Congress for an appropriation to pay these fees. Authorization for this payment must come from Congress, Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975); it cannot be derived from a letter of the Comptroller General addressed to the chairman of a congressional committee.

Finally, Judge Van Graafeiland noted that the Comptroller General's opinion itself cautions "that only the administrative agency involved can make the determination as to whether payment of the expenses of indigent intervenors is appropriate." Pointing to the Commission's determination that it should not reimburse parties protecting their own interests, the judge argued that the Court "should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness" (slip op. 833).

ARGUMENT

1. The majority's holding that the Commission has authority to award fees to intervenors rests upon an opinion of the Comptroller General construing the Atomic Energy and Energy Reorganization Acts at the behest of the Nuclear Regulatory Commission (NRC). The majority also

cites a subsequent letter to the Chairman of the House Oversight and Investigations Subcommittee in which the Comptroller stated that there is no significant difference between the authority of the Commission and of the NRC.

There exists, however, a fundamental difference between the NRC's organic statutes and Part I of the Federal Power Act, here being construed, that renders the Comptroller General's basic rationale for finding the authority to grant fees and expenses inapposite when applied to the statute involved here.

Section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), provides, in relevant part, that all hydroelectric licenses issued by the Commission are subject to the condition that

> * * * the licensee shall pay the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part * * *.

Hydroelectric regulation by the Commission is self-sustaining, and the costs of such regulation are borne directly by the Commission's licensees. 1/ See Hearings on Public Works for Water and Power Development and Energy Research Development before the Senate Comm. on Appropriations, 94th Cong. 2d Sess., pt. 4, at 3498 (1976). The provision by the Commission of

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1/ With the exceptions, not relevant here, of licensees of minor projects and certain State and municipal licensees for which exemption from payment of annual charges for costs of administration have been granted by the Commission. See 18 C.F.R. §§11.23, 11.24 (1976).

fees and expenses of intervenors in licensing proceedings would be a cost of administration of Part I of the Act. 2/

Therefore, the cost of the Commission's award of expenses to intervenors in licensing proceedings would in fact be borne by the licensees themselves. Such an award would run directly afoul of the United States Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), which affirmed "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees." Id. at 257.

Citing Alyeska, the majority stated (slip op. 827):

> Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest [citations omitted], the Comptroller General has concluded that fee reimbursement is distinguishable from fee shifting because it involves no exercise of compulsion against a private party.

Even granting the validity of the Comptroller General's distinction between fee reimbursement and fee shifting, the distinction is of no relevance in the instant case, for fee shifting is precisely what is involved here. If, for example, the Durham petitioners were reimbursed by the

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2/ The majority cites Section 2 of Part I of the Act, 16 U.S.C. §793, as the Commission's authority for such reimbursement.

Commission in the manner suggested by the majority (slip op. p. 828 n. 5), the costs would eventually be paid to the United States by State and municipal licensees 3/ in the proporition that the authorized installed capacity of each licensee's projects bears to the total capacity of all projects under license. See 18 C.F.R. §11.20(b)(2), (3) (1976). The holding of Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975), is thus directly applicable to this case. In Turner, the court relied on Alyeska in affirming a decision of the FCC that it had no authority to require a license applicant to reimburse the fees of intervenors. The court found that the reasoning of Alyeska (514 F.2d at 1356):

> * * * is fully applicable to litigation before the Federal Communications Commission. Congress has no more delegated a "roving commission" to the FCC than it has to the Judiciary to allow counsel fees as costs or otherwise whenever the [Commission] might deem them warranted.

3/ PASNY is a "municipality" as defined in Section 3(7) of the Act, 16 U.S.C. §796(7). The Commission provides different criteria for the assessment of annual charges for State and municipal licensees on the one hand, and all other licensees on the other. See 18 C.F.R. §11.20 (1976).

2. The majority found (slip op. pp. 827-28) that "the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses"[footnote omitted]. At a stroke, the majority thus found the decision to have superseded the judgment of this Commission, to have overruled the decision of this Court in Greene County I, and to have been the equivalent of an Act of Congress.

a. When first presented with petitioners' request for an award of fees and expenses in this proceeding, the Commission held that it lacked the statutory authority to make such an award, whether by requiring PASNY to pay the fees, or by paying the fees itself. This determination was affirmed by this Court (see 2.b. infra) and reiterated by the Commission in the opinions under review.

This interpretation given the Act by the Commission, the agency charged with its administration, is entitled to great deference by the Courts. Udall v. Tallman, 380 U.S. 1, 16 (1965); cf. Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 409-410 (1975). The reviewing court should not substitute its judgment for that of the Commission, if the Commission's interpretation is reasonable. Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975); Alabama Power Co. v. FPC, 482 F.2d 1208, 1221 (5th Cir. 1973).

Here the majority has not found the Commission's interpretation of its statutory authority to be unreasonable; rather, it has found (slip op. pp. 827-28) that the Comptroller General's decision is "not clearly incorrect." The conclusion does not form an adequate basis for reversal of the Commission's interpretation of the Act.

b. More significantly, the majority appears to have construed the Comptroller General's opinion as overruling this Court's prior holding in Greene County I.

In that case, the Court said (455 F.2d at 426):

> [W]e perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them. * * *

In this case, on the strength of the Comptroller's opinion, the majority holds that "the FPC now appears to have authorization to pay intervenors' expenses."

If another panel's decision in Greene County I is to be discarded, that should be done by the entire Court, not by this panel. For that reason alone, rehearing en banc should be granted.

c. But the Comptroller General's opinion should not be permitted to have that effect. It is not an act of Congress to which this Court must bow nor is it a "far clearer congressional mandate" which justifies abandoning Greene County I. The precise effect of the Comptroller

General's decision is that the General Accounting Office, in passing upon the accounts of the NRC, cannot question any disbursements made by the NRC pursuant to the decision. 31 U.S.C. §74. As Judge Van Graafeiland points out, the Commission has never applied for a decision by the Comptroller on this question, and the Comptroller did not request the views or comments of the Commission prior to the letter sent to the Oversight and Investigations Subcommittee Chairman. Moreover, the statute relied upon by the majority in its finding that the Comptroller General is Congress' agent for the purpose of determining the legality of administrative expenditures, 16 U.S.C. §65(d), is merely a general declaration of congressional policy that sound financial and accounting procedures throughout the Federal government be the goal of auditing by the Comptroller. Surely the statute does not delegate to the Comptroller the authority to bind the Congress, the Courts, and administrative agencies by the mere act of rendering an opinion at the request of an agency.

3. Generally, the courts have no authority to concern themselves with the policies of the Commission. Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 612 (2nd Cir. 1965). Even if the Comptroller General's conclusion as to this Commission's authority to award expenses were binding on this Court, the Commission submits that the majority has improperly construed the Comptroller General's opinion so as to displace the Commission's discretion in a matter of policy.

The Comptroller General stated:

> The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

The NRC itself, in a decision issued after oral argument had been held in the instant case, has decided as a matter of policy that it will not initiate a program to provide funding to participants in its licensing, enforcement, and anti-trust proceedings. Statement of Considerations Terminating Rulemaking, Financial Assistance to Participants in Commission Proceedings, 41 Fed. Reg. 50829 (November 18, 1976). The NRC accepted the Comptroller General's statement of its legal authority, finding that his opinion is entitled to "substantial deference." 41 Fed. Reg. at 20830. Nevertheless, the NRC went on to state (41 Fed. Reg. at 20831):

> The institutional role of Congress in resolving the funding question must be respected. Funding involves the direct transfer of public money to support a private viewpoint; a viewpoint which is not subject to control or oversight by the public's elected representatives and which may or may not reflect the views of many members of the public. * * * From our perspective, we lack not only the statutory authority to provide funding, but we also find, as a policy matter, that a non-elected regulatory Commission is not the proper institution to expend public funds in this fashion absent express Congressional authorization.

The considerations noted by the NRC are the more compelling in the instant statutory context, where private (licensee) funds would be used to support the private interests of intervenors, without discernible benefit to the licensees or to their ratepayers. Cf. FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); National Cable Television Ass'n. v. United States, 415 U.S. 336, 340-42 (1974). The majority's finding (slip op. p. 829), however, that "there is a good chance that the Durham intervenors may meet the standards approved by the Comptroller General" and remand for the Commission's consideration in light of those standards appear to preempt Commission's discretion in this important question of policy.

CONCLUSION

For the foregoing reasons, the Commission respectfully submits that the rehearing or rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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